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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 165

ERNST SCHWENK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Appeals dismissed petitioner's appeal without opinion (R. Part II, 11). The opinion of the District Court (R. 88–104) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1949 (R. Part II, 11). The petition for a writ of certiorari was filed on July 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals acted arbitrarily in dismissing, for failure to prosecute, petitioner's appeal from the denial of his motion to vacate the judgment of denaturalization previously entered against him.[1]

STATEMENT

Petitioner, who became a naturalized United States citizen on January 20, 1937 (R. 39),[2] is one of twenty persons against whom denaturalization proceedings were instituted in 1943, under Section 338 of the Nationality Act of 1940, in the United States District Court for the Southern District of New York. The District Court (Bright, D. J.) ruled that petitioner's naturalization oath was fraudulent and accordingly revoked his citizenship (see *United States* v. *Kuhn,* 49 F. Supp. 407, 435), the order being entered on June 1, 1943 (R. 1–3). Petitioner did not appeal or attempt to appeal from the judgment of denaturalization (R. 99).

Briefly stated, petitioner's own testimony at the denaturalization trial showed that he came to the United States in 1923 (R. 20), filed a petition for naturalization on June 20, 1936, and was admitted

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[1] Petitioner seeks to raise other questions which, we believe, are not properly presented in the light of the action taken by the court below.

[2] References to pages 20–87 of the record are to pages in the original record which is on file in the Office of the Clerk of this Court.

to citizenship on June 20, 1937 (R. 39); that in September 1934 he joined the New York Unit of the Friends of New Germany, and, in 1936, the German-American Bund (R. 21); that he remained an active member of the Bund until 1941 and subscribed for the Bund paper from 1934 to 1941 with the exception of a period from 1935–1936 (R. 22, 23); that he attended the Bund's Camp Siegfried and Camp Nordland (R. 27); that he contributed $25 for Camp Siegfried (R. 28) and $12 to help pay Fritz Kuhn's bail in the latter's trial (R. 28, 29); that he was a collector for the Fighting Fund of the Bund (R. 30); that he became an "O. D." member in 1936 and wore the Bund uniform in parades (R. 32); that he was block leader (R. 39) and "book ward" (R. 40) for the New York unit of the Bund, and its secretary for the purpose of applying for a public dance permit (R. 41); that from 1936 to 1941 he made a living selling all kinds of German propaganda books (R. 45, 46, 48); that as long as he lived he thought the white man in America should be superior to Jews and Negroes (R. 61, 62); that if he were called to the Army, he would refuse to fight against Germany (R. 67); that he considered his "blood" more important than his citizenship (R. 67); and that his "first" country was always Germany, America taking second place (R. 84).

On July 30, 1948, petitioner filed in the District Court for the Southern District of New York—

the same court in which the judgment cancelling his citizenship was entered—a motion praying that he be relieved of the denaturalization judgment under Rule 60 (b), subdivisions 5 and 6, of the Federal Rules of Civil Procedure (R. 4).[3] The court (Leibell, D. J.) denied the motion on November 1, 1948 (R. 105; opinion at R. 88–104), from which order petitioner, by his counsel, noted an appeal to the Court of Appeals for the Second Circuit on November 5, 1948 (R. 106). After petitioner failed to take timely steps to perfect the appeal, the Court of Appeals dismissed the appeal on April 6, 1949 (R. Part II, 11), pursuant to a motion to dismiss filed by the United States Attorney (R., Part II, 1).

ARGUMENT

On November 5, 1948, petitioner filed a notice of appeal from Judge Leibell's order of November 1, 1948, refusing to vacate the denaturalization judgment of June 1, 1943 (R. 106). No stipulation was ever entered into or filed extending the time for petitioner to docket the cause and file the record on appeal (R. Part II, 2, 5). The appeal was dismissed by the Court of Appeals on April 6, 1949 (R. Part II, 11) pursuant to a motion by the Government to dismiss the appeal

[3] Affidavits of petitioner's newly retained counsel (R. 6–10), petitioner himself (R. 11–17), and an Assistant United States Attorney (R. 18–19), and petitioner's testimony at the denaturalization trial (R. 20–87) were considered by the court in ruling on this motion.

for failure to docket the cause within the time allowed[4] and for failure to prosecute (R. Part II, 1). Petitioner concedes that he did not perfect the appeal, the reason assigned being that he was awaiting hoped for administrative relief from the Attorney General (Pet. 29). He now contends that the ruling of the Court of Appeals dismissing his appeal was arbitrary and capricious (Pet. 27). This argument is clearly without merit and its rejection by the Court of Appeals hardly raises a question warranting the intervention of this Court.

An appeal may be dismissed for failure to prosecute diligently and file the record on appeal,[5] and the matter of dismissal is discretionary with the court.[6] Petitioner's hope for administrative relief did not excuse his total disregard of the prescribed procedures,[7] and a reading of the affidavit of the Assistant United States Attorney, in

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[4] Rule 73 (g) of the Federal Rules of Civil Procedure, as amended, effective March 19, 1948, provides that the record on appeal shall be filed and the appeal docketed within 40 days from the date of the filing of the notice of appeal.

[5] *Grigsby* v. *Purcell*, 99 U. S. 505, 506; *The Virginia*, 19 How. 182, 183; *Wendel* v. *Hoffman*, 104 F. 2d 56, 57 (C. A. 3).

[6] *Woods* v. *York*, 171 F. 2d 904 (C. A. 5); *Markham* v. *Kallimanis*, 151 F. 2d 145, 146 (C. A. 9), certiorari denied, 327 U. S. 788; *In re Prudence Co., Inc.*, 29 F. Supp. 630, 632 (E. D. N. Y.).

[7] *Muckelroy* v. *Baldwin*, 70 F. 2d 728, 729 (C. A. 8); *Markham* v. *Kallimanis*, 151 F. 2d 145, 147 (C. A. 9), certiorari denied, 327 U. S. 788.

support of the motion to dismiss (R., Part II, 2–3), and of the counteraffidavit of petitioner's counsel (R., Part II, 7–9) makes it apparent that the action of the court below was neither capricious nor arbitrary.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1949.

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*The motion to dismiss was filed pursuant to Departmental instructions to United States Attorneys to make every effort to expedite and dispose of litigation arising out of the alien enemy program. The situation which evoked the Department's particular insistence, in this field, on firm opposition to unnecessary delay has been previously called to the attention of this Court. See Memorandum in Opposition to Petitioner's Application for a Stay, Memorandum for the Respondent in Opposition, and Supplemental Memorandum for Respondent in *Ahrens* v. *Clark*, No. 446, October Term, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1949